

RULEMAKING NOTICE FORM

Notice Number	2016-177	Rule Number	He-P 4038 (various)
1. Agency Name & Address:		2. RSA Authority:	RSA 125-F:5, IV & V
NH Dept. of Health & Human Services		3. Federal Authority:	Nuclear Regulatory
Division of Public Health Services			Commission 10 CFR 20
Radiological Health Section (RHS)		4. Type of Action:	
29 Hazen Drive		Adoption	
Concord, NH 03301		Amendment	X
		Repeal	
		Readoption	
		Readoption w/amendment	

5. Short Title: **The Physical Protection of Category 1 and Category 2 Quantities of Radioactive Material**

6. (a) Summary of what the rule says and of any proposed amendments:

The Department of Health and Human Services, Radiological Health Section (DHHS/RHS) is proposing to amend He-P 4038 in order to comply with recommendations made during a recent review of the He-P 4038 by the Nuclear Regulatory Commission (NRC).

He-P 4038 establishes the NRC physical protection requirements for licensees who possess and transport Category 1 or Category 2 radioactive materials in order to protect the materials from theft or diversion. The proposal to amend the rule includes the following sections of the rule: He-P 4038.03, He-P 4048.08, 4038.09, 4038.10, 4038.12, and He-P 4038.26. Proposed amendments to the rule include:

- **Amending He-P 4038.03(s)(2) by replacing “DHHS/RHS” with “Department of Energy;”**
- **Amending He-P 4038.08(i) intro. and (i)(2) by replacing “reviewing official” with “licensee;”**
- **Amending He-P 4038.08(i)(4) and He-P 4038.12(c) by replacing “shall” with “may” in order to mirror NRC regulations;**
- **Amending He-P 4038.08(k)(3) intro. for clarity by deleting (k)(3)b. and incorporating the text into (k)(3) intro.;**
- **Amending He-P 4038.09(a)(2)g. by replacing “obtain” with “to the extent possible, obtain;”**
- **Amending He-P 4038.10(a)(1) by adding the words “Nuclear Regulatory” to identify “Commission;” and**
- **Amending He-P 4038.10(c)(1) and (2) by providing the current mailing address and telephone number, as required; and**
- **Amending He-P 4038.26(a)(1) by adding additional contact information.**

6. (b) Brief description of the groups affected:

The licensees who use, possess, and transport Category 1 and Category 2 quantities of radioactive material, and all licensees and persons who seek unescorted access to Category 1 and 2 quantities of radioactive material are affected by the rule.

6. (c) Specific section or sections of state statute or federal statute or regulation which the rule is intended to implement:

Rule	State or Federal Statute or Federal Regulation Implemented
He-P 4038.03 intro., (s) intro., & (s)(2)	10 CFR 37.5
He-P 4038.08(i) intro.,(2), & (4), (k) intro., (k)(3) intro., & (3)b. [deleted]	10 CFR 37.23
He-P 4038.09(a) intro., (a)(2) intro., & (a)(2)g.	10 CFR 37.25
He-P 4038.10(a) intro., (a)(1), (c) intro., (c)(1), & (2)	10 CFR 37.27
He-P 4038.12(c)	10 CFR 37.31
He-P 4038.26 intro., (a) intro., & (a)(1)	10 CFR 37.77

7. Contact person for copies and questions including requests to accommodate persons with disabilities:

Name:	Catherine Bernhard	Title:	Rules Coordinator
Address:	Dept. of Health and Human Services	Phone #:	271-9374
	Administrative Rules Unit	Fax#:	271-5590
	129 Pleasant St.	E-mail:	catherine.bernhard@dhhs.state.nh.us
	Concord, NH 03301		

TTY/TDD Access: Relay NH 1-800-735-2964 or dial 711 (in NH)

The proposed rules may be viewed and downloaded at:

<http://www.dhhs.nh.gov/oos/aru/comment.htm>

8. Deadline for submission of materials in writing or, if practicable for the agency, in the electronic format specified: **Thursday, October 27, 2016**

☒ Fax

☒ E-mail

☐ Other format (specify):

9. Public hearing scheduled for:

Date and Time: **Thursday, October 20, 2016 at 1:00 p.m.**

Place: [**DHHS Brown Building, Room 232, 129 Pleasant Street, Concord, NH**](#)

10. Fiscal Impact Statement (Prepared by Legislative Budget Assistant)

FIS # 16:187, dated 09/15/16

1. Comparison of the costs of the proposed rule(s) to the existing rule(s):

There is no difference in cost when comparing the proposed rules to the existing rules.

2. Cite the Federal mandate. Identify the impact on state funds:

Pursuant to Section 274b of the Atomic Energy Act of 1954, as amended, the State of New Hampshire is an agreement state with the Nuclear Regulatory Commission (NRC). Accordingly, New Hampshire is required to have a program in place that is adequate and compatible with federal regulations. The proposed changes are to ensure consistency with federal regulations. There is no impact on state funds.

3. Costs and benefits of the proposed rule(s):

A. To the State general or State special funds:

None.

B. To State citizens and political subdivisions:

None.

C. To Independently owned businesses:

None.

11. Statement Relative to Part I, Article 28-a of the N.H. Constitution:

The proposal modifies an existing program or responsibility, but does not mandate any fees, duties or expenditures on the political subdivisions of the state, and therefore does not violate Part I, Article 28-a of the N.H. Constitution.

Amend He-P 4038.03(s)(2), effective 5-25-16 (Document #11105), so that He-P 4038.03 intro., (s) intro and (s)(2), are cited and read as follows:

PART He-P 4038 THE PHYSICAL PROTECTION OF CATEGORY 1 AND CATEGORY 2 QUANTITIES OF RADIOACTIVE MATERIAL

He-P 4038.03 Definitions. As used in in He-P 4038:

(s) "Person" means:

(2) Any individual, corporation, partnership, firm, association, trust, estate, public or private institution, group, Government agency other than the Nuclear Regulatory Commission or the Department of Energy (DOE), except that the ~~DHHS/RHS~~ Department of Energy shall be considered a person within the meaning of the regulations in 10 CFR chapter I to the extent that its facilities and activities are subject to the licensing and related regulatory authority of the Nuclear Regulatory Commission under section 202 of the Energy Reorganization Act of 1974 (88 Stat. 1244), the Uranium Mill Tailings Radiation Control Act of 1978 (92 Stat. 3021), the Nuclear Waste Policy Act of 1982 (96 Stat. 2201), and section 3(b)(2) of the Low-Level Radioactive Waste Policy Amendments Act of 1985 (99 Stat. 1842), any state or any political subdivision of or any political entity within a state, any foreign government or nation or any political subdivision of any such government or nation, or other entity; and

Amend He-P 4038.08, effective 5-25-16 (Document #11105), by amending (i) intro., (i)(2), (i)(4), & (k)(3) intro., and deleting (k)(3)b., so that He-P 4038.08(i) intro., (i)(2), (i)(4), (k) intro., & (k)(3) intro. are cited and read as follows:

He-P 4038.08 Access Authorization Program Requirements.

(i) The ~~reviewing official~~ licensee shall:

(2) Not permit any individual to have unescorted access until the ~~reviewing official~~ licensee has evaluated all of the information collected to meet the requirements of He-P 4038.07 through He-P 4038.13 and determined that the individual is trustworthy and reliable. The reviewing official may deny unescorted access to any individual based on information obtained at any time during the background investigation;

(4) ~~Shall~~May terminate or administratively withdraw an individual's unescorted access authorization based on information obtained after the background investigation has been completed and the individual granted unescorted access authorization; and

(k) Prior to any final adverse determination, licensees shall provide:

(3) Each individual with an opportunity to make revisions, corrections, updates to, or explanations of information in his or her criminal history record, if the individual believes it is incorrect or incomplete in any respect. The licensee shall provide at least 10 days for an individual to initiate action to challenge the results of an FBI criminal history records check after the record being made available for his or her review. The individual may initiate a challenge which shall include:

~~b. At least 10 days for an individual to initiate action to challenge the results of an FBI criminal history records check after the record being made available for his or her review;~~

Amend He-P 4038.09(a)(2)g., effective 5-25-16 (Document #11105), so that He-P 4038.09(a) intro., (a)(2) intro, & (a)(2) g. are cited and read as follows:

He-P 4038.09 Background Investigations.

(a) Before allowing an individual unescorted access to category 1 or category 2 quantities of radioactive material or to the devices that contain the material, licensees shall complete a background investigation of the individual seeking unescorted access authorization. The scope of the investigation shall encompass at least the 7 years preceding the date of the background investigation or since the individual's eighteenth birthday, whichever is shorter. The background investigation shall include at a minimum:

(2) Verification of the true identity of the individual who is applying for unescorted access authorization to ensure that the applicant is who he or she claims to be. A licensee shall:

g. ~~To the extent possible, obtain~~ independent information to corroborate that provided by the individual (e.g., seek references not supplied by the individual); and

Amend He-P 4038.10(a)(1), (c)(1) & (c)(2), effective 5-25-16 (Document #11105), so that He-P 4038.10(a) intro., (a)(1), (c) intro., (c)(1) & (c)(2) are cited and read as follows:

He-P 4038.10 Requirements for Criminal History Records Checks of Individuals Granted Unescorted Access to Category 1 or Category 2 Quantities of Radioactive Material.

(a) General performance objective and requirements:

(1) Except for those individuals listed in He-P 4038.11 and those individuals grandfathered under He-P 4038.09(b), each licensee subject to the provisions of this subpart shall fingerprint each individual who is to be permitted unescorted access to category 1 or category 2 quantities of radioactive material. Licensees shall transmit all collected fingerprints to the Nuclear Regulatory Commission for transmission to the FBI. The licensee shall use the information received from the FBI as part of the required background investigation to determine whether to grant or deny further unescorted access to category 1 or category 2 quantities of radioactive materials for that individual;

(c) When processing fingerprint checks, the licensee shall:

(1) Use an appropriate method listed in the Nuclear Regulatory Commission 10 CFR 37.7 to submit to the Nuclear Regulatory Commission, Director, Division of Facilities and Security, 11545 Rockville Pike, ATTN: Criminal History Program/Mail Stop ~~TWB~~-03B46M, Rockville, Maryland 20852-2738, one completed, legible standard fingerprint card (Form FD-258, ORIMDNRCOOOZ), electronic fingerprint scan or, where practicable, other fingerprint record for each individual requiring unescorted access to category 1 or category 2 quantities of radioactive material. Copies of these forms may be obtained by writing the Office of Information Services, Nuclear Regulatory Commission, Washington, DC 20555-0001, by calling 1-630-829-9565, or by email to *FORMS.Resource@nrc.gov*. Guidance on

submitting electronic fingerprints can be found at <http://www.nrc.gov/site-help/e-submittals.html>;

(2) Submit payment with the application for the processing of fingerprints through corporate check, certified check, cashier's check, money order, or electronic payment, made payable to "U.S. NRC." (For guidance on making electronic payments, contact the Security Branch, Division of Facilities and Security at 301-~~415-7513492-3531~~.) Combined payment for multiple applications is acceptable. The Commission publishes the amount of the fingerprint check application fee on the NRC's public Web site. (To find the current fee amount, go to the Electronic Submittals page at <http://www.nrc.gov/site-help/e-submittals.html> and see the link for the Criminal History Program under Electronic Submission Systems.); and

Amend He-P 4038.12(c), effective 5-25-16 (Document # 11105), cited and to read as follows:

He-P 4038.12 Protection of Information.

(c) The personal information obtained on an individual from a background investigation ~~shall~~ may be provided to another licensee:

Amend He-P 4038.26 (a)(1), effective 5-25-16 (Document #11105), so that He-P 4038.26 intro., (a) intro., and (a)(1) are cited and read as follows:

He-P 4038.26 Advance Notification of Shipment of Category 1 Quantities of Radioactive Material. As specified in He-P 4038.26(a) and (b), each licensee shall provide advance notification to the governor of a state, or the governor's designee and DHHS/RHS of the shipment of licensed material in a category 1 quantity, through or across the boundary of New Hampshire, before the transport, or delivery to a carrier for transport of the licensed material outside the confines of the licensee's facility or other place of use or storage.

(a) Procedures for submitting advance notification shall be:

(1) Made to DHHS/RHS, and the office of each appropriate governor or governor's designee. The contact information, including telephone and mailing addresses, of governors and governors' designees, is available on the Nuclear Regulatory Commission's website at <https://nrc.scp.gov/special/designee.pdf>. A list of the contact information is also available upon request from the Director, Division of Material Safety, State, Tribal, and Rulemaking Programs, Office of Nuclear Material Safety and Safeguards, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001.

APPENDIX

Rule	State or Federal Statute or Federal Regulation Implemented
He-P 4038.03 intro., (s) intro., & (s)(2)	10 CFR 37.5
He-P 4038.08(i) intro.,(2), & (4), (k) intro., (k)(3) intro., & (3)b. [deleted]	10 CFR 37.23
He-P 4038.09(a) intro., (a)(2)	10 CFR 37.25

intro., & (a)(2)g.	
He-P 4038.10(a) intro., (a)(1), (c) intro., (c)(1), & (2)	10 CFR 37.27
He-P 4038.12(c)	10 CFR 37.31
He-P 4038.26 intro., (a) intro., & (a)(1)	10 CFR 37.77